COMMON LAW: ADOPTION BY STATES—When the common law of England was transplanted by our forefathers in this country, it was pruned of those branches which are not adapted to our conditions. That common law has continued to be the basis of our jurisprudence, except, of course, where it conflicts with, or is repugnant to, the constitution and laws of the United States or of the particular state.

These limitations upon the adoption of the common law are well recognized and beyond dispute.[1] But the question remains whether the states by expressly or impliedly adopting the common law contemplated only the unwritten law, unmodified by statutes, or the enacted as well as the unenacted law of the mother country. The answer is obvious where the express adoption provides for the particular date at which the common law is borrowed. Thus some states have chosen the year 1607, the time of the founding of Jamestown, Virginia.[2] Others have selected 1776, the date of national independence.[3]

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mon-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Off hand, this provision seems incredibly inept. (1) It does not clearly give a right to damages or indemnity in addition to "care and cure," but only a remedy at law. (2) Not purporting to create a maritime right, seemingly it must find its sanction under the commerce clause, the scope of which in this connection is undetermined. (3) Seamen's cases will now be tried in two courts instead of one, with neither knowing quite where it stands. (4) If a right to damages is really created, the Federal courts will be flooded with just the sort of personal injury litigation, with all the attendant evils, that has been done away with by workmen's compensation acts in the state courts.

No doubt the seamen's status requires legislative modification, but this should come by creating a seamen's compensation act, or if that is too radical and a retrograde step is preferred, at least by giving a seaman a clearly defined right to recover damages in a proceeding on the admiralty side of the Federal court, with a jury if deemed necessary. His other rights (wages, expenses of return, care and cure, etc.) could all be handled in the same proceeding. Who can rejoice over this amendment but the notorious "sea-lawyers"?

[1] 8 Cyc. 366, 373; 12 C. J. 175, 184; 22 L. R. A. 501, note; Ann. Cas. 1913E 1222. See also Herbert Pope, The English Common Law in the United States, 24 Harvard Law Review, 6, 25.

[2] Arkansas: Kirby and Castle Digest (1916) § 734; Colorado: Rev. Stats. (1908) § 6295; Illinois: Hurd, Rev. Stats. (1915-16) Vol. 1, p. 596, c. 28 § 1; Indiana: 1 Burns' Ann. Ind. Stats. (1914) § 236; Missouri: 2 Rev. Stats. (1909) § 8047; Virginia: Hening's Stats. at Large, Vol. 9, p. 127, § 6. Kentucky, by § 233 of the Constitution, adopts all general laws in force in Virginia in 1792.

[3] Maryland: Constitution, Bill of Rights, Art. 5; Florida: Gen. Stats. (1906) § 59; Georgia: Cobb's Digest, p. 721, Political Code, § 1, par. 3;

Where, however, simply the "common law of England"[4] is adopted, does the term refer only to the *lex non scripta,* or does it include the *lex scripta* as well? If the latter, what English statutes are included? Only a few years ago the Supreme Court of California definitely stated that "our legislature in its use of the phrase 'common law' had in contemplation the whole body of that jurisprudence as it stood influenced by statute, at the time when the code section was adopted."[5] On the other hand, the Oregon Supreme Court in *Wright v. Wimberly*[6] says that "unless a custom had its origin 'when the memory of man runneth not to the contrary' or from the beginning of the reign of Richard I, the rule was not sufficiently ancient to be classed as a part of the common law."[7]

Two such irreconcilable points of view are both supportable by legal history and logic. At the same time, the legislators in borrowing the common law did not mean to disregard all English remedial legislation which influenced its development.[8] The question, however, is not one of frequent public importance. If the issue is raised whether a particular English statute is a part of the common law, the matter can usually be determined by reference to a state enactment on the subject; if not, the statute in question may be repugnant to the constitution or the state or of the United States, or it may not be applicable to the conditions in this country.[9] It is only in the event that the issue is not caught in

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Rhode Island: Gen. Stats. (1896) c. 297 § 3. The Constitution of New York (Art. 1. § 16) adopts "such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of said colony, on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have not since expired, or been repealed or altered. . . ."

[4] In Iowa, where a statute (Special Session, 1840, c. 29 § 8) provided that "none of the statutes of Great Britain shall be considered as law of this territory," it was held that the use of the term "Great Britain," rather than "England," excluded all English statutes passed since 1707, the date of the union of the crown of England with that of Scotland. O'Ferrall v. Simplot (1857) 4 Iowa, 381, 401. See also Webster v. Morris (1886) 66 Wis. 366, 390, 28 N. W. 353, 57 Am. Rep. 278.

[5] Martin v. Superior Court (1917) 176 Cal. 289. 168 Pac. 135, L. R. A. 1918B, 313. The quotation above refers to § 4468, Political Code, which provides: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the constitution or laws of this state, is the rule of decision in all the courts of this state." The provision is copied almost verbatim from a statute passed in California April 13, 1850. See Stats. 1850-1853, p. 186.

[6] (Oct. 21, 1919) 184 Pac. 740.

[7] Idem, at p. 743.

[8] In California, see Report of Mr. Crosby on Civil and Common Law, Journal of the Senate, First Session 1850, p. 459, recommending the adoption of the "American Common Law" (p. 480).

[9] For example, "the English statute of uses is repugnant to our whole system of conveyances . . . . and inconsistent with the purposes of our system." Estate of Fair (1901) 132 Cal. 523, 536, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70.

this net of limitations that the courts must squarely face the question: what is the common law? *L. N. H.*

CORPORATIONS: THE CORPORATE ENTITY IN GOVERNMENT-OWNED CORPORATIONS—In *Commonwealth Finance Corporation v. Landis*[1] the court held that the United States Shipping Board Emergency Fleet Corporation could not claim immunity from the service of process on the grounds that it was a governmental agency, even though it might appear at the trial that the matter was one relating to which the corporation was clothed with attributes of sovereignty. In the more recent case of *Gould Coupler Company v. United States Shipping Board Emergency Fleet Corporation,*[2] the court went the whole length in holding that the Fleet Corporation was subject to suits in general, like any other corporation.

The United States, as well as any state thereof, is sovereign and cannot be sued without its consent.[3] The sovereign, in discharge of its functions, must commit their exercise to agencies selected for that purpose.[4] The agency chosen may be an individual or a corporation created as an appropriate means of executing the powers of government.[5] If the agency chosen is an individual, he assumes no personal liability for the acts done in exercise of the discretion conferred by law.[6] In the principal cases, Congress saw fit to commit a governmental function to a corporation in which practically all the shares of stock were owned by the United States government. If such a corporation is an integral part of the government it cannot be sued without the sovereign's consent.[7] But if the corporation does not become merged in the government and lose its separate entity, then the

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[1] (Nov. 7, 1919) 261 Fed. 440.

[2] (Dec. 9, 1919) 261 Fed. 716.

[3] Hill v. United States (1850) 9 How. 386, 13 L. Ed. 185; New Hampshire v. Louisiana (1882) 108 U. S. 76, 27 L. Ed. 656, 2 Sup. Ct. Rep. 176; Kawananakoa v. Polyblank (1907) 205 U. S. 349, 51 L. Ed. 834, 27 Sup. Ct. Rep. 526; State of Kansas v. United States (1906) 204 U. S. 331, 51 L. Ed. 510, 27 Sup. Ct. Rep. 388.

For a criticism of the theory of exempting the sovereigns from suit see Austin Tappan Wright, Government Ownership and the Maritime Lien, 7 California Law Review, 242; Harold J. Laski, The Responsibility of the State in England, 32 Harvard Law Review, 447; Chas. H. Weston, Actions Against the Property of Sovereigns, 32 Harvard Law Review, 266; The Davis (1869) 10 Wall. 15, 19 L. Ed. 875.

[4] Berman v. Minnesota State Agricultural Society (1904) 93 Minn. 125, 100 N. W. 732.

[5] McCulloch v. Maryland (1819) 4 Wheat. 316, 4 L. Ed. 579; Osborn v. Bank of the United States (1824) 9 Wheat. 738, 6 L. Ed. 204; California v. Pacific Railroad (1887) 127 U. S. 1, 32 L. Ed. 150, 8 Sup. Ct. Rep. 1073; Indiana v. United States (1892) 148 U. S. 148, 37 L. Ed. 401, 13 Sup. Ct. Rep. 564; Luxton v. North Bridge Company (1894) 153 U. S. 525, 38 L. Ed. 808, 14 Sup. Ct. Rep. 891.

[6] Marbury v. Madison (1803) 1 Cranch 137, 2 L. Ed. 60; Kendall v. United States (1845) 3 How. 87. 11 L. Ed. 506.

[7] Supra, n. 3.